COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

The Berkshire Gas Company	**)**	**D.T.E. 01-56**

REPLY BRIEF OF THE

MASSACHUSETTS DIVISION OF ENERGY RESOURCES

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I. INTRODUCTION

The Massachusetts Division of Energy Resources ("DOER") incorporates its Initial Brief by express reference herein, as filed with the Department of Telecommunications and Energy (the "Department") on November 14, 2001. The Massachusetts Attorney General also filed an Initial Brief on November 14, 2001. The Associated Industries of Massachusetts and the Low-Income Energy Affordability Network, including the Berkshire Community Action Council, Inc. filed comments. The Company filed its Initial Brief on November 21, 2001.

DOER will not reprise its initial arguments here. DOER takes this opportunity to reply to positions taken by the Company in its Initial Brief, as well as to note the issues the Company chose not to address.

II. SUMMARY OF DOER POSITION

DOER maintains that the Company procedurally and substantively failed to fulfill the requirements of G.L. c. 164, ? ? 1E, 94 and the Department's Orders in D.T.E. 99-84; Guidelines for Service Quality Standards ("SQ Orders"). The Company did not submit a Service Quality Plan with its July 17, 2001 Petition. As set forth infra., during the course of the evidentiary hearings in this proceeding and only in response to DOER's repeated Information Requests and three Department Record Requests, the Company involuntarily provided some of the information necessary to develop a Service Quality Plan.

DOER also maintains, as set forth infra., that the Company's proposal for defining

exogenous costs is contrary to Department precedent and is inconsistent with the Department's criteria for evaluating incentive ratemaking plans.

DOER notes that the Company, in its Initial Brief, pages 41 – 42, states that it:

> [r]eserves its legal rights to seek compensatory rates, including, if necessary, merger-related costs, in the event the [PCM] plan is materially altered from that proposed herein. The Company emphasizes that it is not putting a "take it or leave it" proposition on the table with the Department."

DOER submits that a "take-it-or-leave-it" is exactly what the Company is affording the Department with the proposed PCM Plan. If that is the case, DOER respectfully requests that the Department "leave it."

III. THE COMPANY'S STATEMENT OF FUTURE INTENT AND INVOLUNTARY RESPONSES TO DISCOVERY DO NOT CONSTITUTE A SERVICE QUALITY PLAN

DOER's Initial Brief correctly articulated that the Company did not file a substantive Service Quality Plan as part of its proposed Performance Based Rate ("PBR") filing. The Company's failure to do so violated specific statutory and regulatory service quality mandates.[1]

The evidence produced during the seventeen days of hearings clearly demonstrated that the Company was aware of the Service Quality legal requirements and knowingly filed in violation of such requirements. As a result of the Company's blatant violation of the

1 DOER's Initial Brief stated that the service quality statutory requirements are prescribed by G.L. c. 164 ?? 1E, 94, and the service quality regulatory requirements are mandated by the Department's SQ Orders. G.L.c.164 ? 1E requires that all PBR plans include a substantive service quality plan. G.L.c.164 ? 94 requires that rate filings include PBR plans that include a substantive service quality component. The Department's SQ Orders established generic service quality guidelines and required that all distribution companies (electric or natural gas) that file for a rate increase pursuant to G.L.c.164 ? 94 simultaneously file a PBR Plan that includes a substantive service quality component. The Company's filing failed to comply with the requirements mandated by all three legal authorities.

Service Quality requirements, DOER argued that the filing was deficient as a matter of law (see footnote 1), and recommended that the Department dismiss the Company's ? 94 filing in its entirety.[2]

The Company's Initial Brief did not provide any additional information and did not respond to the arguments and positions presented in DOER's Initial Brief. Rather, as described below, the Company merely restated the Service Quality position presented in its original filing, supplemented by substantively meaningless references to Service Quality data, involuntarily provided in response to DOER and Department Information and Record Requests.

The Company's Initial Brief[3] offered no substantive arguments to refute, or address in any way, the simple and obvious fact that the filing did not include a substantive Service Quality component.[4] The Company's Brief merely restates that the Company *intends* to comply with the Service Quality requirements at some future date.[5] DOER finds it laudable

2 In the alternative, DOER recommended that the Department order the Company to file an adequate Service Quality Plan and suspend the effective date of the requested rate increase until the Company complies.

3 The Company's Initial Brief addresses Service Quality issues in § II.B.9, Service Quality; Berkshire Proposes to Implement Fully the Rigorous Standards Adopted in DTE 99-84.

4 Curiously, the Company's Brief does not directly address DOER's positions regarding the service quality legal requirements or the recommendation that the filing be dismissed for failure to comply with those requirements. The Company's silence regarding these issues strongly suggests that the Company does not have any legitimate legal arguments to counter/refute DOER's arguments/positions, or that it agrees with DOER's conclusions. It should be noted that the Company's Brief also describes the Company's intent to comply in the future with respect to reporting requirements and implementation mechanics (e.g. penalty calculations) as required by the Department's SQ Orders. *See Initial Brief at 39-40*. As with the development and implementation of substantive service quality components (measures, benchmarks and penalties) the Company's stated *future intent* to comply with the reporting and implementation requirements is not compliance. These issues need to be addressed/developed in a substantive plan.

5 Specifically, the Company's Brief states that the Company is "acutely aware" of the service quality requirements, that it "embraces" such requirements in the filing, that it "would comply" with the

that the Company now "embraces" the Department's "rigorous" Service Quality requirements. Presumably, this enhanced level of acceptance/recognition somehow translates into a more dedicated, intense commitment to comply with such; *not now, but sometime in the future*. *Embracing* a program, no matter how strongly, does not translate into contemporaneous, substantive implementation.

The Company's Brief also references miscellaneous and incomplete service quality information it was obliged to provide over the course of the hearings.[6] The purpose of citing this information is murky at best. If the provision of the information is somehow intended to represent a supplemental filing, containing adequate information to support the Company's claim that the initial filing contained a substantive Service Quality Plan, it fails utterly.[7] As clearly established in DOER's Initial Brief, and to date, the Company's filing contains nothing more than a statement by the Company that it intends to comply with the Service Quality requirements in the future. The only purpose served by the presentation of

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standards, and would "supplement its filing". *See Initial Brief at 36, 37.*

These statements merely reaffirm the position presented in the original Petition.

6 The Company's Brief references service quality information provided in response to DOER 1-4, 3-1, and the October 5, 2001 DTE-RR-5, 6, and 7. *See Company Brief at 37-38.*

7 The Company's Brief states, at p.37, that the information provided in response to DOER 1-4 was a "supplemental filing." The Company has not amended its original filing. The claim that the information supplied involuntarily, in response to an Information Request, is a "supplemental filing," is without merit and is either misguided or disingenuous. Furthermore, even assuming that the response provided to DOER 1-4 is a supplemental filing that substantively amends the original filing, the information provided, in and of itself, was primarily statements of future intent to develop a Service Quality Plan and was still glaringly deficient. Unassembled components of unrelated data do not create a viable product. Therefore, the Company's argument (assuming this is the purpose of presenting this information) that incomplete information provided after the fact materially revises the filing and substantively complies with the Guidelines for a Service Quality Plan, still fails utterly.

the information in the Company's Brief is to cloud the fact that the filing continues to be devoid of any substantive Service Quality Plan.

During the course of the hearings, it became clear that the Company *did* have sufficient historical data to establish performance benchmarks for the following Service Quality measures:[8]

- Lost work time due to accidents
- Consumer cases
- Billing adjustments
- Meter reading
- Service appointments met
- Telephone response time

With regard to the last three service quality measures, it was established that the Company had sufficient information to establish performance benchmarks, but did not like the data and did not want to use it prior to 2005 (the first day proposed by the Company to establish benchmarks) unless compelled to do so by the Department.[9]

It should be noted here that the Department, through the SQ Orders, in fact ordered the Company to establish the benchmarks. The Department should not be required to issue a separate order in this proceeding. Based on the fact that the Company did have sufficient historical data, as reluctant as it was to produce it, DOER believes benchmarks should have been established, incorporated in a stand-alone Service Quality Plan, and included in the filing on July 17, 2001.

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8 Regarding the first three measures, see Tr. Vol. 4 at. 467. Regarding the last three measures, see Tr. Vol. 16 at 1789-1795.

9 It is worthwhile noting that DOER first requested this information in DOER 1-4, filed on 8/27/01. DOER again requested the data through DOER 3-1, filed on 9/26/01. The Company finally produced (in part) the requested service quality data, in response to three DTE Record Requests, on 10/16/01.

The Company should not be allowed to receive the benefits of the proposed rate increase until it complies with the requirements mandated by the Department's SQ Orders. Therefore, DOER recommends that the Department order the Company to immediately combine and collect its disparate submissions, identify any true data gaps, incorporate this information into a conforming, comprehensive Service Quality Plan and, following Department review and approval, implement performance benchmarks and penalties for all six of the above service quality measures.[10] The Department should suspend the effective date of the proposed rate increase until such time as the Company complies with the Order and all other requirements of the Department's SQ Orders.

The Department should also order the Company to apply the established, weighted service quality penalty percentages to ensure that the Company is subjected to the maximum 2% penalty established by the SQ Orders. If for any reason, the Company does not immediately implement a specific service quality measure benchmark, the associated, weighted percentage penalty should be allocated on a pro-rata basis to the other service quality measures to ensure the maximum potential 2% penalty applies.

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10 DOER notes that the Odor Calls benchmark has been set by the Department and therefore is in effect for Berkshire, as well as all other companies. There was no testimony or opposition offered by the Company concerning the staffing-level benchmark. The Department should order the Company to implement this measure as well.

IV. THE COMPANY'S OVERLY BROAD AND EXCESSIVE FOCUS ON EXOGENOUS COSTS IS ANTITHETICAL TO INCENTIVE RATEMAKING

A. Introduction

The Department, in Incentive Regulation, D.P.U. 94-158 (1995) at 57, established a series of criteria for evaluating incentive ratemaking proposals. These criteria include the requirement that incentive proposals not focus excessively on cost recovery issues, lest they miss the point behind incentive regulation. The Department stated that, if a utility sought to have specific cost recovery issues addressed within the context of an incentive proposal, that utility had to affirmatively demonstrate the necessity of any distinct plan components addressing cost recovery issues by presenting evidence on: (1) the nature of any exogenous costs for which specific rate treatment was sought, and (2) the reasons why those costs should be treated in a different manner than other utility costs that are subject to the incentive mechanism.

The Department also adopted a comprehensive definition of exogenous costs in Boston Gas Company, D.P.U. 96-50 (1996) at 291, which rejected cumulative thresholds as being inconsistent with incentive ratemaking, and distilled costs into three categories:

> Exogenous costs shall be defined as positive or negative cost changes actually beyond the company's control and not reflected in the GDP-PI, including but not limited to, cost changes resulting from:
>
> - changes in tax laws that uniquely affect the local gas distribution industry;
> - accounting changes unique to the local gas distribution industry; and
> - regulatory, judicial or legislative changes that uniquely affect the local gas distribution industry.

The Company failed to demonstrate the basis for its proposed exogenous cost criteria and exogenous cost categories in its Petition and provided no new information during the seventeen days of evidentiary hearings. The Company's Initial Brief was similarly deficient.

B. The Company Concedes That Its Proposed Exogenous Cost Threshold Is Disproportionately Low

DOER argued in its Initial Brief that the Company's proposed $ 50,000 exogenous cost threshold was inconsistent with Department precedent, which applies a principle of proportionality between operating revenues and exogenous cost thresholds. Colonial Gas Company; D.T.E. 00-73 (November 20, 2001) at 20 – 21. DOER Br. at 21 – 23. To be consistent with Department precedent, DOER argued that the minimum exogenous cost threshold for this Company would be $ 75,000. DOER Br. at 23.

The Company relies upon the exogenous cost threshold first established for Boston Gas Company; D.P.U. 96-50 (Phase 1) (1996).[11] Company Brief at 28. The Company's only other basis for the $ 50,000 figure is the recommendation of the Company's witness, Dr. Kenneth Gordon, in two pending Connecticut cases, both involving Company affiliates. Company Brief at 28.

What is significant in the Company's Brief is the statement that:

> Using Colonial Gas as a comparison (using revenue data for 1999 and 2000), the exogenous cost threshold for Berkshire would be about $ 65,000. This threshold assures that exogenous cost recovery is involved only for material events and

11 DOER similarly pointed out that the threshold in Boston Gas Company; D.P.U. 96-50 (Phase 1) (1996); was low. DOER also noted that, in the three cases following Boston Gas Company; Bay State Gas Company, D.T.E. 98-31 (1999); Commonwealth Electric Company, D.T.E. 99-19 (1999); and Colonial Gas Company; D.T.E. 97-112 (1999); the Department established significantly higher thresholds. DOER Br. at 23, footnote 23.

cannot repeatedly be used as a "make whole" device by the Company. Company Brief at 28.

The Company has, apparently sua sponte, increased its proposed threshold by $ 15,000. While DOER applauds the Company's initiative and concession that the original $ 50,000 figure was too low, DOER maintains its position that Department precedent requires a minimum exogenous cost threshold of $ 75,000.

C. The Company's Response to DOER's Arguments Against Cumulative Thresholds Is Telling By Omission

The Company proposed a $ 10,000 cumulative exogenous cost threshold. In its Price Cap Mechanism Terms and Conditions ("PCM"); BG-24 at KLZ-1. The Company maintained this position during the hearing, without providing any basis in fact or in law supporting the proposal. DOER Br. at 23 – 24.

The Company's Brief notably fails to address this issue at all. While it restates the Company's position that a cumulative threshold is desirable, it provides no objective basis for either the cumulative threshold concept or for the actual amount selected by the Company. Company Brief at 26. DOER maintains that the Department should, without qualification, reject the Company's cumulative threshold proposal.

D. The Company's Two-Tier Definition of Exogenous Costs Does Not Stand Up To Scrutiny

DOER argued in its Initial Brief that the Company's criteria for identifying exogenous costs were impermissibly broad, "embracing" any change that could affect the national gas utility industry as a cost to the Berkshire Gas Company. DOER Br. at 24 – 27. The Company's Brief offers no new insight or support for its criteria. It merely reiterates that it

limits itself to the entire national gas utility industry, rather than "embracing" the entire economy. Company Br. at 27.

DOER urges the Department to eliminate these sweeping provisions, as it did in Boston Gas Company; D.P.U. 96-50 (1996) at 291, and limit exogenous costs to those uniquely affecting the local gas distribution industry.[12]

The Company's Brief offered no new information or justification in support of its separate exogenous cost category for "Acts of God" *(force majeure*). The Boston Gas Company definition addresses these categories and costs comprehensively, rendering "Acts of God" and "Force Majeure" both vague and redundant as proposed in the Company's filing.

E. Lost Base Revenues Are Not, In Seriatim, Exogenous Costs

The Company argues that lost base revenues, as a matter of Department precedent, must be treated as a categoric exogenous cost. Company Brief at 27. This is simply not the case.

As DOER argued in its Initial Brief, the Department will consider lost base revenues

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12 The Company's Brief does provide a new modifier of the criteria that is significantly more stringent than the language proposed in the PCM.

The Company Brief argues that the Department, "has allowed the utility the opportunity to recover exogenous costs that could materially [emphasis added] affect its ability to earn its allowed rate of return." At 25 – 26. The Company's PCM provides that exogenous costs must have "at least a disproportionate [emphasis added] effect on the Company or the natural gas industry and not be adequately accounted for in the price index." BG-24 at KLZ-1.

DOER agrees with the Company argument concerning the effects of exogenous costs, at least to the extent that "materially" is the accurate and acceptable modifier, rather than "disproportionate." "Disproportionate" means "not in proportion." "Materially" means "to a great extent," "substantially," "considerably." Webster's New World Dictionary, third ed., Simon and Schuster (1983). DOER advocates that the Department, to the extent it considers retaining the Company's definition, revise the PCM language by replacing "disproportionate" with "material" as articulated by the Company.

that exceed the Rolling Period Method as an exogenous cost if an exogenous cost calculation filing, with appropriate supporting documentation, is submitted for a comprehensive Department review. DOER Br. at 34 – 35. The Department did not determine that lost base revenues are per se, a new category of exogenous costs, as much as the Company would like that determination in advance of any filing.

The Company's Brief also states that DOER implied in its Initial Brief that the Company's separate lost base revenues category was inconsistent with the settlement agreement entered into between DOER and the Company on July 12, 2001; D.T.E. 01-29 ("DOER Settlement").[13] Company Br. at 51. DOER did not *imply* this. DOER stated *directly* that such provision was inconsistent and was intended to provide the Company with the opportunity to categorically collect additional lost base revenues that would otherwise be foreclosed by the Rolling Period Method, commencing in February 2002.

DOER's conclusion was supported by the cross examination testimony of the Company's Vice President and Chief Financial Officer, Karen Zink. On October 4, 2001, Ms. Zink directly stated as follows:

> Q. As set forth in the PCM Terms and Conditions right now, filed as part of the petition, does this language give Berkshire the authority to come in and treat as an exogenous cost lost base revenues exceeding rolling period methodology and exceeding your threshold from the effective date of your rate case, be that February 3, 2002, going forward? (emphasis added).
>
> A. Yes. (Tr. Vol. 4 at 451).

While the Company argues that it does not intend to attempt collection of lost base

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13 As set forth in detail in DOER's Brief, the DOER Settlement, the term of which runs from May 1, 2001 through May 1, 2004, expressly provides that recovery of lost base revenues was subject to the

revenues exceeding the Rolling Period Method until at least 2005, the PCM,

as confirmed by Ms. Zink, would provide the Company with the basis to seek such collection immediately. Company Br. at 51 – 52.

When asked on cross examination if the Company would agree to amend the PCM language to reflect the company's stated intention to NOT seek such cost recovery until after the expiration of the DOER Settlement in 2004, Ms. Zink agreed that the Company could consider such an amendment. (Tr. Vol. 4 at 441). However, when asked about specific language to be incorporated into the PCM, Counsel for the Company suggested a record request and the witness did not respond further (Tr. Vol. 4 at 442).

The Company's Brief does not propose the revision with which Ms. Zink appeared to agree. The Company's Brief refuses to even acknowledge the inherent contradiction acknowledged by Ms. Zink. What remains is the express authority in the PCM to recover lost base revenues in excess of amounts recoverable through the Rolling Period Method, from February 2002 forward, contrary to the terms of the DOER Settlement.

The Company could have eliminated this issue by proposing the revision agreed to by its own witness. It could still resolve this issue by submitting a revision to its PCM. However, unless and until that happens, DOER's argument and opposition to this language remains.

Department's Rolling Period Method and limited to amounts recoverable through the conservation charge

F. Conclusion

If, after review and consideration of all of the filings and arguments on brief, the Department does not dismiss the Company's PCM, DOER urges the Department to strike Section I. C. 3. Exogenous Costs, as set forth at BZ-24, KLZ-1 and: (1) establish a $ 75,000 threshold, with no cumulative threshold, and (2) incorporate the Boston Gas Company definition of exogenous costs.

IV. CONCLUSION

For the above stated reasons, the Massachusetts Division of Energy Resources requests, following review and consideration, that the Department adopt and incorporate the recommendations set forth in its Initial Brief and in this Reply Brief.

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mechanism. DOER Br. at 29 – 30.